Supreme Court, U. S.
FILED
FEB 6 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1211

JAMES B. FRINK, Petitioner

vs.

THE UNITED STATES NAVY PERA (CRUDES) and THE UNITED STATES NAVY PHILADELPHIA NAVAL SHIPYARD and HONORABLE J. WILLIAM MIDDENDORF, II, SECRETARY OF THE NAVY, CAPTAIN GERALD R. JONES, USN, COMMANDER, PHILADELPHIA NAVAL SHIPYARD, PHILADELPHIA, PENNSYLVANIA, EDWARD F. TYNER, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

MARVIN F. GALFAND, ESQUIRE
Counsel for Petitioner
1515 Locust Street
7th Floor
Philadelphia, PA 19102
(215) 732-4600

BRUCE M. LUDWIG, ESQUIRE
Of Counsel
1515 Locust Street
7th Floor
Philadelphia, PA 19102
(215) 546-5510

## INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes, federal rules, and regulations involved | 3 |
| Statement | 4 |
| Reasons for Granting the Writ | 11 |
| Conclusion | 18 |
| Appendix "A" | |
| Memorandum and Order of U.S. District Court | A-1 |
| Judgment Order of Court of Appeals | A-13 |


## CITATIONS

Cases


| | |
|---|---|
| Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-267 (1977) | 12 |
| Chandler v. Roudebush, 425 U.S. 840 (1976) | 4 |
| Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) | 16, 18 |
| Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) | 13, 17 |
| McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) | 2, 11, 16 17 |
| Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) | 12, 18 |

INDEX

Statutes, Federal Rules and Regulations


| | |
|---|---|
| 28 U.S.C. §1254 (1) | 2 |
| 42 U.S.C. §2000 et seq. | 2, 3, 11, 16 |
| Federal Rules of Civil Procedure, Rule 41 (b) | 4 |






**IN THE**
**SUPREME COURT**
**OF THE UNITED STATES**
**OCTOBER TERM, 1979**

---

**No. _____**

**JAMES B. FRINK, Petitioner**

**vs.**

**THE UNITED STATES NAVY PERA (CRUDES) and THE UNITED STATES NAVY PHILADELPHIA NAVAL SHIPYARD and HONORABLE J. WILLIAM MIDDENDORF, II, SECRETARY OF THE NAVY, USN, COMMANDER, PHILADELPHIA NAVAL SHIPYARD, PHILADELPHIA, PENNSYLVANIA, EDWARD F. TYNER, Respondents**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on October 11, 1979.

## OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania in Civil Action No. 76-1374 (September 28, 1977) is unreported and appears in Appendix A infra. The Judgment Order issued by the Circuit Court of Appeals, without opinion, in No. 78-1203 (October 11, 1979) is unreported and appears in Appendix A, infra.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

In this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., Petitioner, (Plaintiff-Appellant below), charged that his non-selection for a promotion was racially discriminatory. In the relative absence of direct evidence of discriminatory motive, Petitioner sought to prove discrimination by means of two alternative approaches: 1) proof of disparate treatment and other indirect evidence of discrimination; and 2) by establishing a prima facie case of racial discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). With respect to the first



theory of discrimination, the District Court improperly restricted plaintiff's proof to direct evidence of discriminatory motive. With respect to Petitioner's second theory of discrimination, the District Court improperly interpreted and applied this Court's decision in McDonnell Douglas Corp., supra. Accordingly, the District Court, whose Opinion and Order was affirmed per curiam by the Circuit Court, erroneously held that Petitioner failed to make out a prima facie case of discrimination.

The questions presented are:

1. Whether the District Court erred in holding that Petitioner Frink failed to make out a prima facie case of racial discrimination based on competent evidence of unlawful motivation and disparate treatment.

2. Whether the District Court erred in holding that Petitioner Frink failed to establish a prima facie case of racial discrimination under McDonnell Douglas, supra.

3. Assuming the establishment of a prima facie case of discrimination, did Respondents meet its burden to rebut the inference of racial discrimination?

## STATUTES INVOLVED

The federal statutes involved is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e - 16 (a), which states, in pertinent part:

> "All personnel actions affecting employees or applicants for employment (. . .) in military departments as defined in section 102 of Title 5, . . . shall be made free from any discrimination based on race, color, religion, sex or national origin."

## STATEMENT

This case concerns a claim by James B. Frink, a black civilian employee of the Department of the Navy, who asserted that his non-selection for a promotion at the Philadelphia Naval Shipyard was due to racial discrimination in violation of Title VII of the Civil Rights Act of 1964. Plaintiff was granted a trial de novo in the United States District Court for the Eastern District of Pennsylvania. See, Chandler v. Roudebush, 425 U.S. 840 (1976). At trial, the administrative record and various other documents were introduced into evidence. In addition, Frink and other individuals involved in the promotion action testified.

After presentation of plaintiff's case, defendants below (hereinafter "the Navy"), moved for dismissal under F.R.C.P. 41(b). The District Court denied this motion and the Navy proceeded with its case. By Memorandum and Order of September 28, 1978, the District Court entered judgment in favor of defendants and against plaintiff on the basis that Frink had failed to make out a prima facie case of discrimination. (A. 12)

The position involved in this lawsuit was that of a Naval Architect, GS-13. This position was posted in a vacancy announcement dated November 23, 1973. The title of this position was later changed from Naval Architect to Program Manager. The filling of this vacancy was to be governed by the Navy's Merit Promotion Program, a competitive selection process. While this program is designed to insure fairness and non-discrimination in the selection process, in practice it did not have that effect.

Frink was the only black applicant for the position,



for which four individuals would be selected. On the basis of his application, Frink was found to be possessed of the basic or minimum qualifications for the position. In order to be further considered in the selection process, a candidate had to be deemed "highly qualified." Only those who were rated "highly qualified" could be selected for the position. In order to be "highly qualified" in this case, a score of three points or more was required on two "cut-off" job elements or criteria.

These job elements were set forth in the vacancy announcement for the position of Program Manager. From the job elements, a crediting plan for rating the applicants was formulated by a rating panel. Based on this crediting plan, supervisory evaluations of the applicants were made. In Mr. Frank's case, one supervisory voucher was completed by his first line supervisor, Mr. Edward F. Tyner, and another by his second line supervisor, Joseph M. Cloud. These supervisory evaluations were then translated by the rating panel into numerical scores and placed on a rating sheet for each individual applicant. Because Petitioner Frink did not attain a score of three points or higher on the two "cut-off" job elements, he was not considered "highly qualified." His application, then, did not proceed further as he was no longer eligible for selection. As previously noted, ultimately four white males, who were rated "highly qualified," were selected for the position that Frink applied for.

Frink claims that his failure to be rated "highly qualified" and his non-selection were due to discrimination against him based on his race. Specifically, this discrimination occurred, in the first instance, in the form of the adverse evaluation given to Frink by his first level supervisor, Edward F. Tyner.

This important evaluation was extremely low and unfair in its appraisal of Mr. Frink's work performance. Out of 32 categories in which Tyner rated Frink, Frink received "barely acceptable" grades in 19. The evidence that this evaluation was unreasonably low is overwhelming. For example, the Equal Employment Opportunity Counselor at the Philadelphia Naval Shipyard who initially reviewed Frink's administrative complaint of discrimination, found that Tyner's evaluation was unreasonably low and could not have been completed in "good faith." (R.II at 95)[1] Moreover, after hearing testimony concerning Mr. Frink's qualifications and job performance at an administrative hearing, a Civil Service Commission Complaints Examiner found that the valuation of Frink by Tyner was marked "in a manner contradictory to the information otherwise developed concerning the Complainant's (Frink's) performance/personal traits." He went on to state that, ". . .except for the appraisal (by Tyner), there was no written documentation of less than acceptable performance. . .". The Complaints Examiner, therefore, concluded that Tyner's appraisal of Frink was "low." (R. II at 281, 284) Finally, the Secretary of the Navy, after reviewing this case, stated that "Mr. Frink's supervisor (Tyner) rated him unduly low. . ." (R.II at 293) Clearly, then, this adverse evaluation could not be explained or justified on the basis of a bona fide assessment of Mr. Frink's qualifications or job performance. Indeed, this low evaluation cannot be explained by any non-discriminatory reason. While there is some direct evidence that Tyner was racially

[1] "R. " references are to volumes and the page numbers of the Appendix filed with the Court of Appeals.



biased, there is a great deal of circumstantial evidence, which was ignored by the District Court, which indicates that Tyner (a white) discriminated against Frink on the basis of Frink's race (black).

For example, Frink and two other employees testified that they believed Tyner had a hostile attitude towards blacks. Moreover, the low evaluation of Frink represents disparate treatment of a minority when compared to non-minority employees. Thus, for example, two members of the rating panel, involved in this case admitted that Tyner's appraisal of Frink was one of the lowest evaluations they had ever seen in their vast experience. (R. I at 177-178, 203) And, it was impossible to show that Tyner was generally a "hard marker." None of Tyner's other evaluations were as low as the one Tyner gave Frink. (R. I at 182-83) All of the other employees Tyner supervised were white. (R. I at 190; II at 171) In fact, when the Navy sought to prove otherwise through the testimony of two employees supervised by Mr. Tyner, the evidence on cross examination showed that Tyner was not a "hard marker" when it came to white employees. (Compare Frink's evaluation, R. II at 49, with that of Menta, R. II at 327) In short, Frink was treated differently than white employees. Other evidence, albeit indirect or circumstantial, was presented to support a claim of racial discrimination. The specific department of the Philadelphia Naval Shipyard involved in this promotion action has a reputation of discriminating against minorities. Indeed, this pervasive feeling among the black employees of PERA (CRUDES) discriminates against blacks was noted by the Secretary of the Navy when he reviewed this case. (R. II at 293) In addition, while erroneously disregarded by the lower court, the Navy has admitted, in their own affirmative

action plans, that it suffers from under-representation of minorities with respect to the position here at issue, (R. II at 296-297, 325-326), and, that its affirmative action efforts were merely "passive."

The Navy was unable to rebut the strong inference of racial discrimination that these factors create. For example, originally, during the administrative process on Frink's discrimination complaint, Tyner stated that Frink's poor job performance necessitated job counseling. But, while under cross examination, during the administrative hearing, Tyner admitted there was no substantiation for this claim and was forced to retract the allegation. It should be noted, that Tyner did not take the stand during the hearing before the District Court.

There was also a contention that the low evaluation given by Tyner could be explained, in a non-discriminatory fashion, by stating that Tyner rated Frink on the basis of "potential" as opposed to actual performance. This explanation is mere pretext. The clear instructions on the supervisory evaluation form presented to Tyner make it clear that Tyner was to evaluate Frink on the basis of his actual performance as Tyner observed it, and not on the basis of a perceived potential. (R. II at 49, 250, 252, 270) Moreover, Tyner, himself, during the administrative hearing, denied that he used potential as the basis for his evaluation of Frink. Thus, the use of potential cannot provide a non-discriminatory explanation for the low evaluation given to Frink. It should be pointed out, however, that Tyner improperly permitted his subjective views to enter into his evaluation of Frink. For example, he was reported to have stated that Frink was not the right man for the job because he is not "outgoing." (R. II at 95) It is asserted that racial



bias pervades this subjective judgment, especially given the testimony that Tyner has a hostile attitude towards blacks, that he lives in a "predominantly white community," and that he has friends who refer to blacks in racist terms.

In sum, the unduly low and discriminatory evaluation given by Tyner cannot be explained by Frink's actual performance, a claim that Tyner generally marked all employees low, or a claim that Tyner rated Frink on the basis of potential rather than past performance. The only explanation, and one supported by the evidence presented, is that the evaluation was racially motivated. Given this clear inference, the Navy sought to claim that, on the basis of two factors, the evaluation was harmless. First, the Navy argued, and the District Court erroneously concurred, that Frink would not have received a score of three points in the two "cut-off" elements even if Tyner's evaluation was not counted. The reasoning behind this argument was that while Frink's second line supervisor, Mr. Cloud, gave him at least three points in all observed items within job elements one and four, Cloud also noted "not observed" scores on some other items within these two job elements. It was then further reasoned that these "not observed" ratings translated into a score of two points, thereby pulling Cloud's average rating of Frink in the "cut-off" job elements below three points.

This reasoning is clearly erroneous. The applicable crediting plan, developed by the Navy in this case, sets forth the guidelines for scoring. These guidelines state that only where both appraisors indicate a "not observed" will a score of two points be assigned. The guidelines state that where there is only a single "unknown rating," this rating ". . . will indicate no basis for evaluation by the appraisor and, therefore, should not be included in the process of averaging

a candidate's evaluation on that particular element/sub-el - ment." (R.II at 24) Accordingly, under the Navy's own guidelines, the "not observed" ratings given to Frink by Cloud should not be assigned a score of two points, but rather should be simply taken out of the calculation. If Tyner's discriminatory evaluation is ignored, then, Frink would have obtained a score of three points on the two crucial job elements. Thus, Tyner's evaluation did prevent Frink from being rated "highly qualified" and eligible for selection in this promotion.

A second argument made by the Navy, in order to remove the effects of Tyner's evaluation, was that even if Frink had been rated "highly qualified" he would not have been selected for promotion. Specifically, the Navy argued that the position of Program Manager called for someone with broad, inter-disciplinary experience, which Frink allegedly did not have. This argument is erroneous and should have been dismissed. In the first instance, the establishment and use of this separate rating factor to judge the applicant's specialized experience is highly suspect. This separate rating factor was established during the same time that the panel was rating the applicants. It is, therefore, improper under the Navy's Merit Promotion Program. (R. II at 320, ¶6a) Moreover, assuming that the use of this specialized experience factor was not mere pretext, its use had an unlawful disparate impact on minorities. A special equal employment opportunity memorandum compiled by the rating panel indicated that there were two minority employees that were in the position and the grade level from which the selection to the Program Manager normally would be expected to be made. Yet, as one member of the rating panel testified, neither of



these two minority employees would have the necessary qualifications with respect to this factor, in the panel's opinion. (R. I at 156-157) This disparate impact in the alleged application of the special experience factor disqualifies it as a basis for removing Frink from selection consideration, given that the Navy never justified the use of this factor as being job-related. Finally, with respect to the specialized experience criterion, it should be noted that Frink was assigned the same score (two points) that Mr. Gaynor, a white male who was selected for promotion, received. (Compare R. II at 40 with 316) Accordingly, Frink's alleged lack of specialized experience cannot explain his non-selection.

Notwithstanding all of the above, the District Court found that Frink failed to make out a prima facie case of discrimination, and this judgment was endorsed by the Court of Appeals for the Third Circuit without opinion. ( A 14 )

## REASONS FOR GRANTING THE WRIT

Clearly, the decision below decides a federal question of vital importance in a way which conflicts sharply with applicable decisions of this Court. The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) In order to achieve this purpose, a plaintiff must be given a "full and fair opportunity to demonstrate by competent evidence that . . . (a challenged decision or action is) racially pre-

mised." Id. at 805 n.18. By restricting the type of evidence that Petitioner could use to prove discrimination, and by accepting pretextual explanations and appearances of fairness, the courts below have delivered a lethal blow to Title VII.

1. Surely Petitioner should have been able to prove racial discrimination in reliance on indirect and circumstantial forms of evidence. Otherwise, Petitioner would be denied a "full and fair opportunity" to prove his case. As this Court explained in Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977):

> "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."

That other forms of indirect or circumstantial evidence, such as departures from normal procedures or other inconsistencies, can be relied upon as competent evidence was further established by this Court's opinion in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-267 (1977).

Clearly, then, the lower courts erred in failing to find that Tyner's evaluation of Frink was not racially motivated because of any lack of "direct evidence" of racial discrimination. (A. 3, 4, 6, and 7 ) Thus, for example, the lack of an objective basis, in terms of Frink's qualifications and job performance, that would warrant the low supervisory evaluation he received, was ignored. Similarly, the lower court apparently did not find relevant the inconsistencies in the explanation for this low evaluation and tha lack of any credible, non-discriminatory reason for the low evaluation. Also not considered was the irrefutable conclusion that Tyner, in evaluating Frink, treated him differently than he



did other non-minority employees. Tyner, in other words, was only a "hard marker" for Frink, a conclusion further borne out by the completely unsuccessful efforts of the Navy to prove otherwise.

The opinion evidence that PERA (CRUDES) was hostile towards minorities and that, more specifically, that Tyner was racially biased was also not given any weight. Similarly, the statistics which showed under-representation of minorities in PERA (CRUDES) and in the grade and position of the job in question was also erroneously dismissed. In this regard, the District Court even refused to accept an admission by the Navy that its affirmative action efforts were merely passive and that there was a problem with respect to under-utilization of minorities.

Finally, evidence concerning the lack of safeguard to insure fairness and the existence of highly suspect procedural irregularities was presented but improperly disregarded by the lower courts. For example, there was clear evidence that Tyner allowed subjective criteria to enter into his evaluation of Frink. There was also the introduction of an entirely new job criteria (specialized experience) after the applications were already before the rating panel and evidence that this job criteria had a disparate impact on minority employees who were likely candidates for selection. These highly suspect irregularities did not, however, bother the District Court, as it concentrated solely on the procedural safeguards and guidelines which existed on paper. Yet, this Court has clearly instructed the lower federal courts to look beyond appearances. Procedures utilized by employers may appear to be "fair in form but discriminatory in operation." Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971) Thus, for example, it is absurd to concentrate, as did the District

Court on the detailed written instructions provided to supervisors when those instructions are totally ignored by the supervisors and no measures are taken to prevent this. This was clearly the case with respect to Tyner's completion of Frink's evaluation which clearly was not based, as the instructions clearly demand, on actual performance of Frink as observed by Tyner. It is equally ridiculous to point to the presence of a black on the rating panel as a "safeguard designed to prevent discrimination." (A.7,8 ) While there was a black on the rating panel, he did not know Frink or his race. (R. I at 202; II at 79-80) In fact, this black member of the rating panel testified that had he known Frink was black, he may well have been suspicious of racial discrimination given the extremely low evaluation Tyner (white) gave Frink. (R. I at 203-204) Thus, the presence of a black on the rating panel did not actually serve as a safeguard. Fair in form was not fair in operation. Nor can it be said that the existence of two supervisory appraisals acted as a meaningful safeguard, as the District Court claimed. The second line supervisor admitted that his evaluation was based, in part, on his conversations with Tyner concerning Frink. Moreover, the second line supervisor, Cloud, was not in the best position to judge Mr. Frink's job performance. While a substitute evaluation could have been obtained from a prior first level supervisor of Mr. Frink, under the Navy's Merit Promotion guidelines, this was not done.

In short, this case reveals the total absence of safeguards which actually had any effect. Therefore, the attention given by the District Court to these alleged safeguards was totally improper and prejudicial to the outcome of Petitioner's case.

For these reasons, Frink was deprived of the opportunity to prove that his non-selection for promotion resulted from improper motivation and disparate treatment.



2. With respect to the District Court's conclusion that Tyner's evaluation did not cause Frink's non-selection, this is simply a case of plain error based on a clearly erroneous finding. If one properly applies the Navy's own guidelines, as contained in the crediting plan used in this promotion action, Frink would have been rated "highly qualified" and eligible for selection, if Tyner's evaluation was ignored and the rating based solely on the evaluation made by Cloud. In finding otherwise, the District Court simply misapplied the Navy's own guidelines which were before it. The District Court then makes another error when it states that assigning a low value to a "not observed" rating is appropriate, on the reasoning that such a rating indicates a lack of experience. (A. 3, 4 n.3) Here, the District Court was refering to certain "not observed" ratings given to Frink by his second line supervisor, Mr. Cloud. A "not observed" rating does not indicate a lack of experience. (Nor does the Navy's guidelines indicate that it should). It simply indicates that the rater does not have a basis on which to make a judgment for that particular item, since that judgment must be made on observed performance. This may well be the case for a person like Cloud, who is a second line supervisor, and thus does not observe Frink's work on a day-to-day basis.

The District Court's finding that Tyner's evaluation was unimportant to this case had two serious effects on Petitioner. First, it erroneously allowed the Court to conclude that Frink was not harmed. Secondly, it erroneously permitted the lower court to minimize or overlook the strong and overwhelming evidence that Tyner's evaluation was racially

discriminatory. If all aspects of racial discrimination in federal employment are to be eliminated, review of this aspect of the lower court's opinion must be obtained.

3. The lower court, with the approval of the Circuit Court, misinterpreted and misapplied this Court's Opinion in McDonnell Douglas, and Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

At one point, the District Court stated that –

> ". . . It is difficult for the Court to determine which applicants were most qualified for the promotion to the GS-13 position." (A. 5 )
> (Emphasis Added)

This is not the relevant test. A Title VII complainant need only show, under McDonnell Douglas, that he, a minority, was rejected for a vacancy for which the employer continued to seek applicants with similar qualifications. 411 U.S. at 802. In this erroneous statement of the law, and in other parts of the District Court's memorandum opinion, it is clear that the District Court was expecting Frink to prove that absent discrimination, he would have been the person selected for promotion. Yet, this places a burden on the plaintiff which is greater than that necessary to establish a prima facie case of racial discrimination under McDonnell Douglas.

Here, the facts show, that absent the discriminatory evaluation completed by Tyner, Frink would have been "highly qualified." As such, he would have been deemed qualified for selection, to the same extent as were the four white employees actually selected.

Nor can one distinguish Frink's qualifications on the



basis that he did not have the specialized inter-disciplinary experience that the rating panel considered. As previously noted, the adoption of this additional job element, after the applications were already before the rating panel, was improper and highly suspect. Moreover, reliance on this facially neutral criteria has a disparate impact on minorities. As previously noted, if this specialized experience factor were applied, in the manner suggested by Mr. Lang, the Navy's chief witness, and a member of the rating panel, it would have the effect of disqualifying the only minority employees who were, not only eligible for this position, but deemed to be in a position and grade level from which the selection in this case normally would be made. Application on this experience factor, therefore, has a disparate impact, presumptively illegal under Griggs v.Duke Power Company, supra. Finally, it was clearly established by the evidence and testimony that Frink had as broad a base of experience as did, at least, one of the white selectees. This conclusion was substantiated not only by testimony and documentary evidence, but it is also found in the fact that the rating panel assigned to Frink the same score (two points) as it did to the Electronics Engineer (Mr. Gaynor) who was one of the selectees.

In sum, Frink was as qualified as the persons selected for promotion in this case. Given that Petitioner met all other requirements of the McDonnell Douglas test, it should have been found that a prima facie case of discrimination had been made out. Since the employer here was unable to rebut that inference by offering legitimate and persuasive non-discriminatory reasons for the rejection of Frink, it is contended that judgment should have been entered in favor of Petitioner.

4. In Teamsters v. United States, 431 U.S. at 358, this Court cautioned against an inflexible approach in specifying types of proof needed in a Title VII action. See, Furnco Construction Co., supra., at 575, 577. It is also asserted here that the District Court failed to follow this admonition. Clearly, Frink showed that the entire selection process involved in this case, not simply the evaluation received by Tyner, was tainted with discrimination and its unlawful effects. Sufficient evidence, therefore, was produced, in various forms, adequate to create an inference that the employment decision challenged by Frink was based on discriminatory criteria illegal under the Civil Rights Act. Recognizing this here would serve as a further commitment by this Court to permit flexibility in establishing a prima facie case of individual discrimination. Without this further commitment, individual complainants will not be given the "full and fair opportunity" to challenge employment discrimination.

## CONCLUSION

This Court should grant the Petition for Certiorari and hear the issue raised in this important area of civil rights.

Respectfully submitted,

/s/ Marvin F. Galfand, Esquire
MARVIN F. GALFAND, Esquire
Attorney for Petitioner
1515 Locust Street, 7th Floor
Philadelphia, PA 19102
(215) 732-4600

/s/ Bruce M. Ludwig, Esquire
BRUCE M. LUDWIG, Esquire
Of Counsel
1515 Locust Street, 7th Floor
Philadelphia, PA 19102
(215) 546-5510



## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| JAMES B. FRINK | : | CIVIL ACTION |
| v. | : | |
| THE UNITED STATES NAVY, | : | |
| PERA (CRUDES), et al. | : | NO. 76-1374 |

## MEMORANDUM AND ORDER

Newcomer, J. Entered: October 3, 1977

This case arises out of the non-selection of the plaintiff, James B. Frink, for a promotion. The plaintiff, a black, has charged that the promotion action in question was racially discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000 et seq. Since the plaintiff has failed to make out a prima facie case of discrimination, judgment will be entered in favor of the defendant.

At the time of the challenged action (late 1973), Frink was a naval architect (GS-12) in the PERA (CRUDES) (Planning and Engineering for Repairs and Alterations – Cruisers and Destroyers) department of the Philadelphia Naval Shipyard. Frink applied for a promotion to Naval Architect, GS-13, after the position was listed in a vacancy announcement in October, 1973. The position was to be filled in

accordance with the Navy's merit promotion program. Under this program, interested employees file applications for the vacant position, and the industrial relations office certifies all applicants having the basic qualifications for the position. A rating panel is then created which defines the job more precisely and prepares evaluation forms for the applicants' supervisors. Using the supervisor evaluations and its own review of the applicants' qualifications, the panel then rates all applicants and determines which applicants are "highly qualified." The highly qualified applicants are then ranked in order, and the five highest are interviewed. Additional applicants may be interviewed if more than one position is being filled. The panel then recommends who should be selected.

In this case, Frink was one of 21 qualified applicants for 4 positions, although he was the only black. Ten applicants were rated "highly qualified" and interviewed on the basis of their scores on job elements 1 and 4.[1] Ultimately, four persons were promoted to the GS-13 position. Frink was not deemed highly qualified because he did not achieve an average rating of 3 or better on the crucial job elements 1 and 4. Plaintiff contends that his supervisor evaluations, particularly one completed by Ed Tyner, were discriminatory, and illegally prevented him from being rated "highly qualified" and selected for the position.

---

1. Job elements No. 1 related knowledge of engineering practices, methods and techniques and job element No. 4 concerned the applicant's ability to apply sound management principles in overall planning for multi-ship projects.



After discovering the poor evaluation by Tyner, Frink discussed the matter with several officials at the shipyard, and initiated administrative proceddings by contacting an EEO counselor. Subsequently, an investigative report was prepared, and a hearing was held. The complaints examiner concluded that there was no evidence of discrimination. The Secretary of the Navy concurred in the recommendation of the complaints examiner, although he did find that Tyner's evaluation of Frink was unduly low because he had rated Frink on the basis of potential rather than performance, and the Secretary also noted the existence of a feeling among blacks that PERA discriminated in its employment practices. Frink then appealed the Secretary's decision to the United States Civil Service Commission, which affirmed the finding of no discrimination. Finally, Frink filed this action, seeking review of the administrative decisions.

The plaintiff was granted a trial de novo in this Court. See Chandler v. Roudebush, 425 U.S. 840 (1976). At trial, the administrative record and various other documents were introduced into evidence. In addition, the plaintiff and several other individuals involved in the promotion action testified.

The appropriate standard the plaintiff must meet to show a violation of Title VII was set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973):

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial

> minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications."

The plaintiff easily meets most parts of this test. The crucial issue in the context of this case is whether the plaintiff has established that he was as qualified as the persons actually selected for the promotion.[2]

Much of the evidence presented to the Court did not relate to this issue. For example, the plaintiff questioned the procedural propriety of the rating panel's amendment of the crediting plan, and also established that Tyner had improperly evaluated the plaintiff on the basis of potential rather than past performance. Since there was no direct evidence that either of these actions was motivated by racial discrimination, these issues are not relevant to the plaintiffs' claim. The plaintiff cannot prevail simply by proving procedural irregularities; rather he must prove racial discrimination, either directly or by meeting the McDonnell-Douglas test.

A surprisingly small amount of evidence was presented concerning the comparative qualifications of Frink and the

---

2. The fact that Frink was rated "qualified" for the position by the industrial relations office does not satisfy the McDonnell-Douglas test, since that rating only concerned minimal qualifications. The Supreme Court standard set forth in McDonnell-Douglas essentially requires the plaintiff to show that he was as qualified as the person actually selected. Thus, in a case such as this, more than minimal qualifications must be established. See Oliber v. Moberly Missouri School District, 427 F. Supp. 82, 86 (E. D. Mo. 1977).



persons given the promotion. Frink himself testified at the administrative hearing and at trial concerning his prior experience and his general qualifications. In addition, several witnesses testified on his behalf at the administrative hearing, and several of Frink's supervisors testified at trial. Taken together, all of these evaluations establish that Frink was a slightly above average employee. The evidence did not establish, however, that Frink was as qualified as the employees selected for the promotion. The only evidence presented concerning the qualifications of the selected employees consisted of applications and supervisory appraisals for two of those employees. (Parr and Gaynor). From this limited evidence, it is quite difficult for the Court to determine which applicants were most qualified for promotion to the GS-13 position. The position in question is fairly sophisticated and technical, unlike the occupations often encountered in Title VII cases. Consequently, in selecting employees for promotion, subjective and technical factors necessarily must be considered. The plaintiff claims that his prior experience was comparable to that of Parr and Gaynor. Essentially, I am unable to determine whether this is true, since I do not know what skills or knowledge might have been acquired from particular past assignments, nor can I confidently evaluate the relevance of such prior experience to the position applied for. Several witnesses testified that Frink did not have as broad a base of experience as was desired for the GS-13 position, and without the guidance that might have been provided by expert testimony, I am unable to disagree with this conclusion.

However, even if Frink and the selectees are considered

equal in experience, Frink still has failed to show that he was as qualified. Both Parr and Gaynor, the two selectees attacked by the plaintiff as least qualified, were rated quite highly on the subjective factors which were considered by the panel in making its selections. No evidence was presented to show that these ratings were too high or did not accurately reflect the capabilities of Parr and Gaynor. Frink, on the other hand, was rated much lower. Even disregarding the extremely low rating given by Tyner, Frink would not have been rated "highly qualified" on the basis of the evaluation by Cloud, since he did not have the required average of 3 on elements 1 and 4. Although Frink received a "Very Good" rating (assigned balue =3) on most of the sub-elements of parts 1 and 4, he received three "Not Observed" ratings (assigned value = 2) which made his final average less than 3 on both element 1 and 4.[3] The evidence also shows that supervisor Cloud personally rated both Frink and Gaynor in connection with their applications for the GS-13 position. In 32 of the 37 categories, he rated Gaynor higher than Frink, and in the other five categories, he rated them equal. This is persuasive evidence that Frink was not as qualified as Gaynor for the promotion in question. Moreover, this conclusion is borne out by the testimony concerning Frink's qualifications, which generally showed him to be only slightly above average. Based on the evidence

3. Assigning a relatively low value to a "Not Observed" rating is appropriate, since such a rating indicates a lack of experience in the particular sub-element. For example, a "Not Observed" rating on element 4(d) shows that Cloud was not familiar with any instance in which Frink had managed several projects concurrently, and the lack of such experience would have to be counted against him.



in the administrative record and the additional evidence presented at trial, the plaintiff has not established that he was as qualified as the persons selected, and therefore he has failed to make out a prima facie case under McDonnell-Douglas.

The plaintiff has argued that he nevertheless is entitled to relief because his supervisor appraisals were discriminatory. Undoubtedly, the appraisal made by Ed Tyner was unreasonably and unfairly low. However, there is no direct evidence of racial discrimination. In fact, the plaintiff himself was offered an explanation of the low rating, in that Tyner rated Frink on the basis of potential rather than past performance. While this method of rating may have been improper, it was not necessarily racially discriminatory. Moreover, even if Tyner's evaluation was discriminatory, it did not cause Frink's non-selection. As has been discussed previously, Frink would not have been rated "highly qualified" (and therefore could not have been selected) on the basis of Cloud's evaluation of him, and Cloud's evaluation does not appear to be unduly low. Rather, it is consistent with the other evidence that Frink was a slightly above everage employee.

The plaintiff also relies on the case of Rowe v. General Motors Corp., 457 F. 2d 348 (5th Cir. 1972) for the proposition that allowing white supervisors to evaluate applicants on subjective criteria can be an unlawful discriminatory practice. Rowe is easily distinguishable, however. The Court in Rowe specified five aspects of the defendant's promotion procedures which violated Title VII:

(i) The foreman's recommendation is the indispensable single most important factor in the promotion process.

(ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion . . .

(iii) Those standards which were determined to be controlling are vague and subjective.

(iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.

(v) There are no safeguards in the procedure designed to avert discriminatory practices."
457 F. 2d at 358-59 (footnote omitted).

None of these factors applies in the present case. Two supervisory appraisals are required instead of only one, and they are reviewed by a panel. Detailed written instructions are provided to supervisors, and applicants are rated on specifically described attributes, rather than on vague, general standards. Job vacancies are posted, along with the qualifications required to fill the vacancy. Most importantly, there are numerous safeguards designed to prevent discrimination, including the presence of a black on the rating panel and established procedures for reviewing allegedly discriminatory actions. Under these circumstances, Rowe is inapplicalbe, and the use of evaluations by white supervisors was proper.

Finally, at trial the plaintiff attempted to prove racial discrimination through statistical evidence. Statistical evidence can be sufficient to establish a prima facie case, and such evidence can justify an inference of discrimination in an



individual case. See, e.g., International Brotherhood of Teamsters v. United States, 52 L. Ed. 2d 396 (1977); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The statistical evidence presented in this action, however, fails to establish a prima facie case of discrimination. Most of the plaintiff's statistical evidence focused on the racial composition of PERA. In 1973, approximately 5 percent of the positions in PERA were held by blacks, while more than 16 percent of the general labor force in the Philadelphia SMSA was black. Despite the disparities seemingly demonstrated by these figures, an inference of discrimination is not justified because the plaintiff has not made a comparison to an appropriate labor market. The Supreme Court has held consistently that in order to establish a prima facie case of discrimination through statistical evidence, the plaintiff must compare the defendant's workforce to the group of individuals who possess the necessary qualifications. See Hazelwood School District v. United States, 53 L. #d 2d 768, 777-78 n. 13 (1977). Teamsters v. United States, 52 L. Ed. 2d 396, 418 n. 20 (1977); Mayor of Philadelphia v. Educational Quality League, 415 U.S. 605, 620-21 (1973). "[I]ndirect evidence provided by general population comparisons does not properly yield a threshold inference of racial discrimination in circumstances where. . . the qualifications for the position in question are far removed from these of the average citizen." League of United Satin American Citizens v. City of Santa Ana, 410 F. Supp. 873, 893 (C.D. Cal. 1976).

In this case, the plaintiff's statistical evidence is practically useless because the plaintiff did not take into consideration the fact that a large proportion of the persons

employed by PERA are engineers. The defendant's evidence established that the utilization of black engineers in PERA (about 5 percent) far exceeded the availability of black engineers in Philadelphia (1.5 percent) or in the entire United States (1.2 percent). This evidence completely negates any inference of discrimination in PERA's engineering jobs, and also prevents this Court from drawing an inference of discrimination as to PERA's overall workforce, since PERA contains so many engineering positions. Without more precise statistics on the availability of qualified blacks for positions in PERA, the plaintiff's racial composition statistics fail to prove a prima facie case of discrimination. The fact that the Navy itself in its Affirmative Action Plans has made comparisons to general labor force statistics to determine if minorities are under-represented is not binding on this Court. Whether or not the Navy makes a pointless comparison to general labor force statistics, a violation of Title VII can only be established with probative statistical evidence utilizing comparisons to an appropriate labor market.

The only other statistical evidence presented by the plaintiff was some data allegedly showing the low number of blacks in supervisory positions, and the non-promotion of minorities to higher GS levels during fiscal year 1974. Again, this evidence, although it might not be inconsistent with a finding of discrimination, is insufficient to support such a finding. In view of the fact that most supervisory positions in PERA require an engineering background, and that according to Census information, few blacks have this background, the evidence that blacks are not toally unrepresented in



supervisory positions in PERA actually tends to show a lack of discrimination. Plaintiff's evidence that in fiscal year 1974, no minorities were selected in 34 recruitment actions in the highest GS levels is not persuasive, primarily because so few blacks were eligible for the positions. Apparently only two blacks, in addition to plaintiff Frink, were certified but not selected for promotion to a position graded GS-11 or higher. Without more information concerning the qualifications of these blacks, of the whites selected in their place, and of the whites who were passed over, the non-selection of these two blacks does not prove discrimination.

## CONCLUSION

Since the plaintiff has failed to prove a prima facie case of discrimination, judgment will be entered in favor of the defendant. Although the evidence revealed a possible irregularity in the selection process in the form of an unreasonably low supervisor appraisal, there was no evidence of racial discrimination. A review of the entire record clearly established that the plaintiff was not selected for promotion because he was not as well qualified as the persons actually selected.

/s/ Clarence C. Newcomer, J.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| JAMES B. FRINK | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| THE UNITED STATES NAVY | : | |
| PERA (CRUDES), et al. | : | NO. 76-1374 |

ORDER

AND NOW, to wit this day of September, 1977, for the reasons set forth in the accompanying Memorandum, judgment is hereby ENTERED in favor of the defendants, the United States Navy PERA (CRUDES), et al. and against the plaintiff, James B. Frink.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer, J.
Clarence C. Newcomer, J.



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1203

JAMES B. FRINK,

Appellant

v.

THE UNITED STATES NAVY PERA (CRUDES) and
THE UNITED STATES NAVY
PHILADELPHIA NAVAL SHIPYARD and
HONORABLE J. WILLIAM MIDDENDORF, II,
SECRETARY OF THE NAVY,
CAPTAIN GERALD R. JONES, USN, COMMANDER,
PHILADELPHIA NAVAL SHIPYARD,
PHILADELPHIA, PENNSYLVANIA
EDWARD F. TYNER

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 76-1347)

Submitted Under Third Circuit Rule 12(6)
October 11, 1979
Before: ALDISERT and HUNTER, Circuit Judges, and
MEANOR, District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable Clarence C. Newcomer, Frink v. United States Navy Pera (Crudes), Civ. No. 76-1374 (E.D. Pa. Sept. 28, 1977); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ R.J. Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn, Clerk
Thomas F. Quinn, Clerk

Dated: October 11, 1979

* Honorable H. Curtis Meanor, of the United States District Court for the District of New Jersey, sitting by designation.